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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GREENHILL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE GRESSMAN
GEORGE KAUFMANN
1730 K Street, N.W.
Washington 6, D. C.

EUGENE L. SUGARMAN
165 Broadway
New York 6, New York

*Counsel for Petitioner*

August 22, 1962

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner herein, Kalman Greenhill, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on June 29, 1962.

### CITATION TO OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Second Circuit, dated June 29, 1962, is not yet reported. A copy of that opinion is attached hereto as an Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1962, and a timely petition for rehearing was denied on July 23, 1962. This petition is filed within 30 days from the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether a defendant, in a criminal prosecution arising out of a bankruptcy proceeding, is entitled by virtue of the Bankruptcy Act and the principles of fair judicial administration to inspect an accountant's report submitted to the bankruptcy trustee in his official capacity.

## STATUTORY PROVISIONS INVOLVED

Bankruptcy Act, Sec. 47(a)(10), 11 U.S.C.A. § 75(a)(10):

> (a) Trustees shall . . . (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest . . .

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Bankruptcy Act, Sec. 49, 11 U.S.C.A. § 77:

> The accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest.

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## STATEMENT OF THE CASE

Petitioner was tried and convicted, after a jury trial, on a three-count indictment charging him with transferring assets of the Westco Steel Co. during 1955 in anticipation of bankruptcy and with intent to defeat the Bankruptcy Act, in violation of 18 U.S.C. §§ 152 and 2. The trial took place in the United States District Court for the Southern District of New York. On December 18, 1961, petitioner was sentenced to imprisonment for a year and a day on each of the three counts, the sentences to run concurrently. The Court of Appeals for the Second Circuit affirmed the judgment of conviction on June 29, 1962.

The indictment charged that on January 7, 1956, a petition for arrangement had been filed in a federal district court in the Northern District of California on behalf of Westco Steel Co., which was thereafter on March 1, 1956, adjudicated a bankrupt. Between February 8, 1955, and March 1, 1956, petitioner, while an officer of that corporation, allegedly transferred fraudulently to himself some $16,500 in contemplation of this bankruptcy proceeding. It was further alleged that during the same period petitioner had fraudulently transferred money of Westco to LaSalle Industries, Inc., in the sum of nearly $26,000 and to American Wood Products Co., Inc., in the amount of $8,100. Petitioner allegedly owned or controlled both LaSalle and American Wood.

The facts developed at the trial showed a maze of complicated and intercorporate financial transactions. The trial transcript covers 780 pages and some 500 exhibits, many of them technical accountants' reports and financial statements. The testimony of accountants was critical in attempting to sort out these trans-

actions and to demonstrate where and why the various loans and payments were made.

Petitioner's defense basically was that he was attempting to create and operate a small-scale multi-corporate empire, that Westco was purchased as a part of that plan, and that diminished sales and increased expenses were the true causes of Westco's financial collapse. The payments from Westco to the other corporations, in petitioner's view, were legitimate intercorporate loans, balanced in many instances by repayments to Westco. And payments to petitioner himself, as the financial adviser and managerial head of the small empire, were either legitimate payments for services rendered (Tr. 332) or represented part of the intercorporate relationships.

Basic to petitioner's defense was a demonstration that these payments were not made in contemplation of bankruptcy and that the bankruptcy was in fact caused by economic difficulties that were both unavoidable and unpredictable. To that end, it was essential that he secure all financial data relating to the bankruptcy in 1956, the indictment itself covering the period from February 8, 1955 to March 1, 1956. The records of that bankruptcy proceeding in the federal court in California thus became of prime importance to him, especially since Westco's financial records contained no entries after November 30, 1955. Tr. 144. To trace the events covered by the indictment and culminating in the bankruptcy adjudication on March 1, 1956, necessitated access to and study of the more complete financial records of the bankruptcy trustee.

Accordingly, at the beginning of the trial and in the course thereof petitioner moved for the production by

the Government of a report in its possession made by the accountant for the trustee in bankruptcy. The second application was made in the following language (Tr. 416):

> "If your Honor please, as your Honor recalls, before the beginning of this trial, I made a motion, an oral motion, demanding the production of the accountant's report, the balance sheet, profit and loss statement and other reports prepared by the accountant for the trustee in bankruptcy, which is a public record and which, when we saw it, was not available in Oakland, California. I was advised by Mr. Edwards [the Assistant United States Attorney], as I told your Honor at that time, that that report was in his possession, and I made a motion demanding the production of that report.
>
> "At this time, if your Honor please, I again make that demand."

The application was denied by the District Judge and an exception was duly taken. Tr. 416-417.

In the course of the appeal proceedings before the Court of Appeals, the Government submitted to the judges of that court[1] the following affidavit by Martin J. Dinkelspiel, an attorney for the trustee in bankruptcy of Westco Steel Co.:

> "* * * In my capacity as attorney and under instructions from John Costello, Trustee in Bankruptcy, I prepared a petition for said Trustee requesting authority and an order authorizing the

[1] The Dinkelspiel affidavit was submitted directly to the judges of the Court of Appeals by the United States Attorney as an attachment to a letter dated June 20, 1962, replying to petitioner's reply brief "in accordance with the suggestion of the Court made at the time of oral argument on June 4, 1962." The affidavit does not appear in the record as certified by the clerk of the court below.

employment of Mr. Peter Barnett, a Certified Public Accountant, at that time residing in the City and County of San Francisco, for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955, with particular reference to the withdrawals and payments made to or for the account of the aforesaid Kalman Greenhill, American Bobbin Company, LaSalle Industries, Inc. of New York and LaSalle Industries, Inc. of Maine.

That on or about April 5, 1956, Mr. Barnett submitted this report to me for the Trustee. The purpose of the report was to enable further examination of officers and directors of the bankrupt and to lay the foundation, if any existed, for both civil and possible criminal action against Kalman Greenhill and others. This report was at no time filed with the Referee in Bankruptcy and made a part of the bankruptcy records. This was a private report for the use and benefit of the Trustee and his counsel. A copy of this report was later turned over to the Government voluntarily without the service of a subpoena. Your affiant has been informed and believes and therefore alleges that the report has been in the possession of the United States Attorney for the Southern District of New York during the last year. By reason of the foregoing it never was and is not now a public record and has never been filed in any court. * * *"

In response, petitioner submitted to the judges of the Court of Appeals[2] an affidavit by W. Scott Barrett, an attorney in San Francisco:

"* * * That sometime during the month of August, 1961, at the request of Kalman Greenhill,

[2] The Barrett affidavit also does not appear in the certified record, but was before the judges of the Court of Appeals. See footnote 1, *supra*.

affiant checked the original bankruptcy file of the Westco Steel Company in the United States District Court for the Northern District of California for the purpose of determining whether or not accountants' working papers and audited reports were in the file.

That after a careful examination, affiant determined that no such papers or reports were in said file and thereupon called Mr. Martin J. Dinkelspiel, Attorney for the Trustee of said bankrupt estate and was advised by Mr. Dinkelspiel that all accountants' working papers and audited reports had been turned over to the Federal Bureau of Investigation for transmittal to the United States District Attorney in New York.

That on or about June 13, 1962, affiant again talked to Mr. Martin Dinkelspiel and was advised that so far as he knew said papers and reports were still in the hands of the United States Attorney in New York and that he had no other knowledge as to their whereabouts. * * *"

The Court of Appeals had these affidavits before it in affirming the conviction. And in passing upon the claim that petitioner was entitled, by virtue of the Bankruptcy Act, to inspect the accountant's report, the Court of Appeals stated:

"The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant."

## REASONS FOR GRANTING THE WRIT

The decision below, affirming the District Court's refusal to order the production of an accountant's report to the bankruptcy trustee, denied petitioner a right to which he was clearly entitled under the Bankruptcy Act, and is contrary to the principles of fair judicial administration enunciated by Mr. Justice Holmes for a unanimous Court in *Ex parte Uppercu,* 239 U.S. 435.

Section 47(a)(10) of the Bankruptcy Act mandates the bankruptcy trustee, as an officer of the bankruptcy court, to "furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest." Section 49 of the Act makes crystal clear that "the accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest." These duties were considered sufficiently important by Congress to be reinforced by criminal sanctions; 18 U.S.C. § 154 imposes a fine of up to $500.00 and a forfeiture of office on any trustee who "knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so."

It cannot be seriously contended that Greenhill was not a "party in interest". In the words of the Government's brief to the court below, "Between November 1954, and the date of its demise, the story of Westco Steel was the story of Kalman Greenhill . . ." (Gov't br., p. 3). He was an officer of the bankrupt (Indictment, par. 3; 2d ct., par, 2; 3d ct.. par. 2), and it was the bankrupt's assets which he allegedly transferred to himself. In construing this statute the Sixth Cir-

cuit said, "It is plain, to our minds, that the bankrupt is a party in interest with respect to proceedings whose object is to require a transfer of property under pain of contempt proceedings, and which may result in criminal proceedings . . ." *Petition of Moulthrop*, 249 Fed. 468, 470 (C.C.A. 6), aff'g *In re Greenbaum*, 243 Fed. 965 (E.D. Mich.). The reason for the request or the motive prompting it "cannot prejudice the assertion of a clear legal right or statutory privilege". *In re Sully*, 152 Fed. 619, 621 (C.C.A. 2). Accord: *Redmond* v. *United Funds Management Corp.*, 144 F. 2d 155, 159 (C.A. 8).[3] Petitioner's right to inspect the document was an absolute one by virtue of this Congressional mandate.

Quite aside from the clear command of the Bankruptcy Act, petitioner was entitled to the trustee's records under the principle of *Ex parte Uppercu*, 239 U.S. 435. On behalf of a unanimous Court, Mr. Justice Holmes wrote:

> "It appears from what we have said that there are documents present within the jurisdiction that furnish evidence material to the petitioner's case. The general principle is that he has a right to have them produced. It does not matter whether they have been used in the original cause or not, or to whom they belong. The right to evidence to be obtained from an existing object does not depend upon having an interest in it, or, in a case like this, upon having an interest in the original cause, or

[3] "The right of inspection under Sec. 49 of the Act is broad and absolute, and it obtains regardless of motive where asserted by a party in interest, such as a creditor." 2 Remington on Bankruptcy (1956), Sec. 1132, pp. 606-607. See also 2 Collier on Bankrupty (14 ed., 1962), par. 49, pp. 1831-1833; *In re Samuelsohn*, 174 Fed. 911, 912 (D.C.N.Y.); *In re Saur*, 122 Fed. 101, 103 (D.C.N.Y.).

upon the object being admissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing. The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this forbidding it . . ."[4]

This same liberal policy of full disclosure to aid in the search for truth underlies the opinion of Judge Learned Hand in *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2), quoted with approval in *Jencks* v. *United States*, 353 U.S. 657, 671:

". . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose

[4] The *Upperco* decision also reinforces liberal and broad construction of §§ 47 and 49 of the Bankruptcy Act, and was cited to this effect in *Redmond* v. *United Funds Management Corp.* 144 F. 2d 155, 159 (C.A. 8).

> them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively . . ."

The potential admissibility of these records is not the touchstone by which petitioner's right to inspect under the Bankruptcy Act is to be judged. *Redmond* v. *United Funds Management Corp.*, 144 F. 2d 155, 159 (C.A. 8); *In re Sully*, 152 Fed. 619, 621 (C.C.A. 2); *In re Moulthrop*, 249 Fed. 468, 469 (C.C.A. 6). If the Government can deny the use of records given it by the trustee, the trustee assumes the characteristics of a partisan, contrary to his role as an officer of the court. Indeed, if under the Bankruptcy Act the trustee can give records to the Government and withhold them from petitioner—an officer of the bankrupt charged with a crime in connection with the bankruptcy—there is no law or rule which would prevent another trustee from giving information to a corporate officer and denying it to the Government.

The Court of Appeals held that petitioner "was not harmed by his lack of the report in question." But such speculation is inadmissible, for reasons given by Chief Justice Marshall in *United States* v. *Burr*:[5]

> "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? . . .

[5] 25 Fed. Cas. 187, 191, quoted in *Jencks* v. *United States*, 353 U.S. 657, 668.

> "... It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld? ..."

As the Court said in *Clancy* v. *United States*, 365 U.S. 312, 316, "since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively". That rule lays bare the error of the speculative conclusion of the court below that petitioner was not harmed by the lack of the report in question. Such speculation—as is true of all speculation made in a vacuum—may be totally wrong in fact. If the unproduced report was based even in part on books and records not available to petitioner[6] and if the report contained leads to other evidence of aid to the defense, then petitioner was indeed harmed by the lack of the report. The short of it is that the real impact of the refusal to produce the report cannot be measured without having the report available.

Indeed, the shoe is on the other foot. The Government points to no reason why access to these records, in its possession, should have been denied to the defense. In numerous recent cases this Court has been faced with the task of balancing the need of the defense for documents or other information against the interest of

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[6] Since Westco's books contained no entries after November 30, 1955, and since it would be most unusual if an accountant's report made some time after the institution of the bankruptcy proceedings in 1956 would deem itself bound by the absence of such entries, it seems more likely that the report did contain facts based on records not otherwise available to petitioner at the time of trial. The judgment as to the utilization of such a report is ultimately one to be made by defense counsel.

the Government in maintaining secrecy. See, e.g., *Roviaro* v. *United States*, 353 U.S. 53, 62; *Jencks* v. *United States*, 353 U.S. 657, 669-672; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398-401. There is no policy here to balance against the "general principle that [defendant] has a right to have them produced". *Ex parte Uppercu, supra.* On the contrary, Congress has affirmatively declared that the public interest requires that these records and accounts be opened and has supported this policy with criminal sanctions. The Government's resistance of petitioner's motion for production was not supported by reliance on a need for secrecy, but rather partakes of the "sporting theory of justice" which is now discredited. See *Ex parte Uppercu, supra; Daly* v. *Dimmock*, 55 Conn. 579, 12 Atl. 405; cf. *Hickman* v. *Taylor*, 329 U.S. 495; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214; 6 Wigmore on Evidence, Sec. 1845 (3rd ed., 1940).

The decision below, denying petitioner his statutory right—declared by all precedent to be absolute in nature—deprives him of the fair treatment which Congress sought to accord to all parties in interest. It is in direct conflict with the plain statutory language and with the fundamental tenets of even-handed justice as set forth in the *Uppercu* decision. The assertion of this Court's review powers is thus appropriate.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
GEORGE KAUFMANN
1730 K Street, N.W.
Washington 6, D. C.

EUGENE L. SUGARMAN
165 Broadway
New York 6, New York

*Counsel for Petitioner*

August 22, 1962

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 369—September Term, 1961.

(Argued June 4, 1962 Decided June 29, 1962.)

Docket No. 27372

UNITED STATES OF AMERICA, *Appellee*,

v.

KALMAN GREENHILL, *Defendant-Appellant*.

Before: LUMBARD, *Chief Judge*, CLARK and WATERMAN, *Circuit Judges*.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Thomas F. Murphy, J., upon a jury verdict, on an indictment charging fraudulent transfers in contemplation of bankruptcy, 18 U.S.C. § 152.

Affirmed.

THOMAS DAY EDWARDS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Andrew T. McEvoy, Jr., Assistant United States Attorney, on the brief), *for appellee*.

JACOB W. FRIEDMAN, New York, N. Y., DUDLEY, YOEDICKE, New Orleans, La., JEROME H. DIAMOND, MARTIN BESEN, and IRVING FISHMAN, New York, N. Y., on the brief *for defendant-appellant*.

EUGENE GRESSMAN, Washington, D. C., JEROME H. DIAMOND, New York, N. Y., on reply brief *for defendant-appellant*.

PER CURIAM:

We summarily affirm the conviction of the appellant Kalman Greenhill for fraudulently transferring property

of the Westco Steel Company in contemplation of a bankruptcy proceeding by said company and with the intent to defeat the bankruptcy law in violation of 18 U.S.C. § 152, as we find no merit in the appellant's contentions.

The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant.

The charge to the jury was fair and accurate and adequately covered all the matters on which the jury required instruction. There was ample evidence to support the verdict.

Affirmed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GREENHILL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (R. 196a–197a) is not yet reported.

### JURISDICTION.

The judgment of the court of appeals was entered on June 29, 1962 (R. 197a). A petition for rehearing (R. 201a–207a) was denied on July 23, 1962 (R. 210a). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether, in a prosecution of an officer of a bankrupt corporation for the unlawful transfer of funds

in contemplation of bankruptcy, he was entitled to production of a report by an accountant, prepared at the request of the attorney for the trustee, which had not been filed in the bankruptcy proceedings and which was not shown to be relevant to the criminal charge.

## STATUTES INVOLVED

Section 47(a)(10) of the Bankruptcy Act, 11 U.S.C. 75(a)(10), provides:

> (a) Trustees shall * * * (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; * * *

Section 49 of the Bankruptcy Act, 11 U.S.C. 77, provides:

> The accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest.

## STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of New York for making fraudulent transfers in violation of 18 U.S.C. 152. It was charged that, as an officer and agent of the Westco Steel Company, in contemplation of bankruptcy, he made unlawful and fraudulent transfers of certain sums of money to himself individually, to LaSalle Industries, a corporation, and to American Wood Products Company, a corporation (R. 1a–3a). The jury found him guilty on all three counts (R. 137a). He was sentenced to imprisonment for one year and one day on each of the three counts,

the sentences to run concurrently (R. 186a). On appeal (R. 187a), the judgment was affirmed (R. 197a).

Since the petitioner does not attack the sufficiency of the evidence or the court's charge, a brief statement of the evidence will suffice.

1. Petitioner was the principal beneficial owner of LaSalle Industries of New York, which owned American Wood Products and LaSalle Industries of Maine. LaSalle Industries of Maine in turn owned American Bobbin (R. 52a–53a). Petitioner supervised the work of bookkeepers for these companies (R. 22a, 24a).

In 1954 petitioner, through a company called Bobcal, borrowed $100,000 to be used in that company's purchase of the Westco Steel Company of Oakland, California (R. 12a–14a). Bobcal did purchase Westco, merged with it, and the resultant company eventually became the Westco Steel Company of Delaware (R. 46a–50a, 26a–27a, 74a). Before the merger Westco's net worth was $119,000 and the total assets of Bobcal were $1,000; but after the merger the net worth of the combined company was only $2,400, the reduction being due to the fact that Bobcal had liabilities of $117,500 (R. 26a–27a).

In December 1954, in response to a request by Westco's president for funds to pay accounts payable, petitioner indicated there was no money available for that purpose at the time (R. 74a, 75a). In February 1955, after negotiations by petitioner on behalf of Westco, the company acquired a plant in North Hollywood, California, in addition to the one it already had in Oakland (R. 79a). At petitioner's request

most of the plant inventory was sold at a loss in order to keep the company supplied with cash (R. 80a, 98a, 104a). During 1955, as Westco got progressively farther behind in its payments, the suppliers began to curtail its credit and to put the company on a C.O.D. basis (R. 81a).

Petitioner admitted that he had authority to sign Westco Steel Company checks, and had complete charge of its money (R. 52a–53a). An F.B.I. accountant examined Westco Steel Company's books for the period from November 1954 through November 30, 1955, the date of the last entry in the books (R. 25a, 30a). As of November 30, 1955, his recapitulation (Gov. Ex. 177, R. 138a) showed net total loan disbursements by Westco to the petitioner in the amount of $21,298.15; to LaSalle Industries, Inc., of $45,200.78; and to American Wood Products, Inc., of $8,600.00, for a total combined figure of $75,098.93 (R. 30a–31a, 37a, 45a). In November 1955, in speaking to his accountant about Westco, petitioner stated, "If they don't snap this company up, we're going to have to put it into Chapter XI [of the Bankruptcy Act]" (R. 109a). On January 7, 1956, a voluntary petition for an arrangement was filed pursuant to Section 322 of Chapter XI of the Bankruptcy Act, and on March 1, 1956, Westco Steel Company was adjudicated a bankrupt (R. 1a).

2. Several days after the trial began this colloquy occurred (R. 104a–105a):

> Mr. SUGARMAN [defense attorney]: If your Honor please, as your Honor recalls, before the beginning of this trial, I made a motion, an oral motion, demanding the production of the

accountant's report, the balance sheet, profit and loss statement and other reports prepared by the accountant for the trustee in bankruptcy, which is a public record and which, when we saw it, was not available in Oakland, California. I was advised by Mr. Edwards [Assistant United States Attorney], as I told your Honor at that time, that that report was in his possession, and I made a motion demanding the production of that report.

At this time, if your Honor please, I again make that demand.

The COURT. Do you agree that I told you informally that I had denied it, and you ought to put it on the record now? And I deny it.

Mr. SUGARMAN. That is precisely the reason why I am making the motion now, so the record will be clear.

The COURT. You have an exception.

On appeal petitioner claimed that the report was of vital importance and would have shown that Wested's bankruptcy was the result of business ventures. The government in its brief pointed out that petitioner had made no such claim of materiality at the trial and that by failing to make a proper showing, petitioner had deprived the government of the opportunity to establish that the report was a hearsay summary schedule, prepared by an accountant, based upon books in evidence which petitioner had examined prior to trial. After oral argument in the court of appeals (see Pet. 5, fn. 1), the government submitted an affidavit by the attorney for the trustee in bankruptcy (Pet. 5–6) that an accountant had been employed by the trustee

> for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955, with particular reference to the withdrawals and payments made to or for the account of the aforesaid Kalman Greenhill, American Bobbin Company, LaSalle Industries, Inc. of New York and LaSalle Industries, Inc. of Maine.

The affidavit further stated that the report had at no time been filed with the referee in bankruptcy, was for the use of the trustee and his counsel, and that a copy had been voluntarily turned over to the government. The affidavit of attorney W. Scott Barrett (Pet. 6–7) filed by petitioner was to the effect that he was unable to find the accountant's reports and papers in the bankruptcy file of the Westco Steel Company in the United States District Court for the Northern District of California, and that the attorney for the trustee stated that so far as he knew these documents were still in the hands of the United States Attorney in New York. In ruling against petitioner's claim for production of the accountant's papers the court of appeals stated (Pet. App. 2a):

> The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant.

ARGUMENT

At the trial, petitioner made no showing that he was entitled to production of the report of the accountant for the trustee under either Rule 16 or Rule 17 of the Federal Rules of Criminal Procedure; he made no showing that the report, prepared after bankruptcy, could be evidence in the criminal case; he did not even show that it was material or relevant to his defense. He requested production thereof on the ground that it was a public record which "* * * when we saw it, was not available in Oakland, California" (R. 104a). The present claim that the report might have been of aid in petitioner's defense because it might have contained information other than that which appeared in the books of Westco (Pet. 12, ft. 6) is an afterthought. Moreover, the facts produced before the court of appeals in the affidavit of the attorney for the trustee, which petitioner himself quotes (Pet. 6), show that, if petitioner had, in the district court, endeavored to assert that the report was material to the defense, he would not have succeeded. The record before this Court shows that the accountant was hired "for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955". Not only were Westco's books available to petitioner, but his own accountants examined them and made reports therefrom. See, e.g., testimony of accountant Shechtman that at petitioner's request he prepared a balance sheet for Westco Steel Company as of June 30, 1955, which showed a net deficit in capital of $17,295.12

(R. 68a–69a); and testimony of accountant Levison that at petitioner's request he prepared a financial statement for Westco as of September 30, 1955, which showed a minus net worth of $46,313.67 (R. 106a–107a).

In this Court petitioner argues the issue of his right to see the report as if he had made demand therefor in the bankruptcy proceedings under Section 47(a)(10) and Section 49 of the Bankruptcy Act, 11 U.S.C. 75(a) and 77. Whether or not the petitioner would have had a right in the bankruptcy proceeding to see the report is not controlling here.[1] Not every matter which might be material in the bankruptcy would be material with respect to this criminal charge. Petitioner chose to make his demand for production in the criminal case. He does not even claim that the report could have been evidence in the criminal case.[2] In the absence of a showing that the document had some material bearing on his defense, petitioner's request for production was properly refused.

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[1] We think it clear that petitioner would not have had such a right even in the bankruptcy. A trustee in bankruptcy is permitted to employ an attorney and has both the right and the duty to conduct litigation seeking to recover property belonging to the bankrupt estate. The work papers of the attorney and of persons employed by him for the purpose of litigation would not be the "accounts and papers of receivers and trustees" within the purview of Section 49 of the Bankruptcy Act or "information concerning the estates" under Section 47(a)(10). The cases on which petitioner relies involved documents on file in the bankruptcy proceeding.

[2] His reliance on *Ex parte Uppercu*, 239 U.S. 435, is thus misplaced, for that case concerned a litigant's right to see depositions which could "furnish evidence material to the petitioner's case."

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.
*Assistant Attorney General.*
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GELLHEIM, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## PETITIONER'S REPLY BRIEF

EUGENE GELLMAN
GEORGE KALEMANN
1730 K Street, N. W.
Washington 6, D. C.

EUGENE L. SUGARMAN
165 Broadway
New York 6, New York

*Counsel for Petitioner*

September 26, 1962.

IN THE

# Supreme Court of the United States

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No. 365

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KALMAN GREENHILL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONER'S REPLY BRIEF

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In reply to the Brief for the United States in Opposition petitioner states as follows:

1. The United States has shown no prejudice, asserted no privilege, and established no reason justifying the refusal to produce the report in question. Its sole defense is an alleged lack of materiality and admissibility of the report. But the contention that petitioner made no showing that the accountant's report could be evidence in the criminal case is irrelevant and unresponsive to the issue posed by the petition. Ad-

missibility as evidence is not the criterion for determining whether a defendant is entitled to the production and inspection of a document. If petitioner was entitled to the production of any reports by virtue of the provisions of the Bankruptcy Act, "it is not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316. The use to be made of the reports, once they are produced, is a matter of judgment by defense counsel. Only if such documents are then sought to be introduced does any issue of admissibility arise.

2. The claim that no showing was made as to materiality or relevancy under Rules 16 or 17, Fed. Rules Crim. Proc., is equally unresponsive to the petition. In the first place, since the report was not produced, it is futile to argue over the materiality and relevancy of a document whose very nature remains hidden. The Government's claim of lack of relevancy is therefore meaningless. Moreover, if the petitioner was entitled by virtue of the Bankruptcy Act provisions to the production of the report in question, any problem of satisfying Rules 16 or 17 would disappear. Plainly, if a statute gives an individual an *absolute* right to the production and inspection of a document, that is the end of the matter—and the relevancy of such production is the context of a criminal proceeding is conclusively presumed. See *Campbell* v. *United States*, 365 U.S. 85; *Clancy* v. *United States, supra.**

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* Insofar as it is pertinent to speculate about materiality or relevancy, the Government's assertion that the petitioner's present claim as to possible use of the report is an "afterthought" (Brief, p. 7) is totally unwarranted. The demand for the report both before and during the trial was obviously based on defense counsel's theory that the report might be material or relevant to the preparation of the defense. Why else would the demands have been made?

3. The official court records in the bankruptcy proceedings, of which this Court may take judicial notice, show conclusively that the accountant's report in question was prepared at the official request of the trustee in bankruptcy and that the cost of the report was charged against the estate of the bankrupt. Any contention that this report was not an official report, to which §§ 47(a)(10) and 49 would apply, will not bear analysis.

The official records of the Referee in Bankruptcy of the United States District Court for the Northern District of California, Southern Division, show:

a. That on March 1, 1956, the Trustee petitioned the Referee for authority to employ one Peter Barnett, a Certified Public Accountant, to examine the books and records of the bankrupt "with particular reference to the transactions had between said bankrupt and Kalman Greenhill, LaSalle Industries, Inc., American Robbin Company, and other individuals and corporations affiliated or connected with any or all of the foregoing, and to ascertain the reason for the substantial loss occurring in operations of said bankrupt during the year 1955." It is to be noted that this request, reproduced in full in the Appendix hereto, does not limit the accountant's examination, as claimed in the Dinkenspiel affidavit filed by the Government, to "the period particularly between November 26, 1954, to November 30, 1955." It was a request for a general inquiry into the losses suffered during the whole of 1955. And it was a request premised on "*the belief that benefit will accrue to said bankrupt estate by the employment of said certified public accountant.*" See p. 3a, *infra;* emphasis added.

b. The Referee on March 1, 1956, approved the request and authorized the Trustee to employ Peter Barnett "at the expense of said bankrupt estate" at the rate of $7.00 per hour, "the same in the aggregate not to exceed the sum of $1,000.00."

c. The said Peter Barnett was in fact paid checks, charged to the bankrupt estate, in the amounts of $196.00 (Oct. 19, 1956), $658.00 (April 19, 1956), and $266.00 (June 12, 1956). All of these amounts appear on the official list of disbursements, charged to the bankrupt estate, filed by the Trustee and approved by the Referee.

All of the foregoing documents, certified copies of which are on file with the Clerk of this Court, conclusively demonstrate that the report in question was indeed an official report to the Trustee and that it constituted "information" which was subject to inspection under § 47(a)(10) of the Bankruptcy Act; it was also among those "accounts and papers" which are open to inspection by virtue of § 49 of the Act.*

Any assertion that the report was for the private use and benefit of the Trustee or that it was not filed with the Referee becomes irrelevant. There are no exceptions to the plain commands of §§ 47(a)(10) and 49 in terms of private reports or reports not filed with the Referee. As long as the report deals with the administration of the estate and is paid for out of the estate, the provisions of §§ 47(a)(10) and 49 clearly permit inspection thereof.

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*A request for inspection directed to the bankruptcy Trustee would have been futile since the record here shows that the report in question had been transferred to the possession of the Assistant United States Attorney conducting petitioner's trial.

## CONCLUSION

The vital and unresolved issue thus remains whether it was prejudicial error to deny petitioner the production and inspection of the report in question. The dictates of §§ 47(a)(10) and 49 and the principles enunciated in *Ex parte Upperco*, 239 U.S. 435, make appropriate plenary consideration of that issue by this Court.

For the foregoing reasons, underscoring those set forth in the petition, the writ of certiorari should issue to review the judgment of the court below. The statutory provisions are absolute, the error below is plain, and the situation is appropriate for a summary reversal. At the very least, in view of the absolute commands of the Bankruptcy Act, petitioner is entitled to a production of the document and a hearing below as to the question of materiality now raised by the United States. See *Campbell* v. *United States*, *supra*, 99; *Killian* v. *United States*, 368 U.S. 231, 244.

Respectfully submitted,

EUGENE GRESSMAN
GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

EUGENE L. SUGARMAN
165 Broadway
New York 6, New York

*Counsel for Petitioner*

September 26, 1962.

# APPENDIX

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 45957
In Bankruptcy

In the Matter of

WESTCO STEEL COMPANY, *Bankrupt.*

## Order Appointing Certified Public Accountant

Upon reading and filing the petition of JOHN COSTELLO, Trustee in Bankruptcy of the above named bankrupt, and good cause appearing therefor:

IT IS HEREBY ORDERED that said Trustee employ PETER BARNETT, a Certified Public Accountant, to examine the books and records of said bankrupt, at the expense of said bankrupt estate.

IT IS FURTHER ORDERED that PETER BARNETT be paid for said services the sum of $7.00 per hour, the same in the aggregate not to exceed the sum of $1,000.00.

DATED; March 1st 1956.

BERNARD J. ABROTT
*Referee in Bankruptcy*

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IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 45957
In Bankruptcy.

In the Matter of

WESTCO STEEL COMPANY, *Bankrupt.*

**Trustee's Petition for Authority to Employ a Certified Public Accountant**

To the Honorable BERNARD J. ABROTT, one of the Referees in Bankruptcy of the above entitled Court, in said District:

I.

That on the 27th day of February, 1956, your petitioner was appointed and qualified as Trustee in Bankruptcy of the estate of the above named bankrupt, and is now acting as such Trustee in Bankruptcy.

II.

That it will be necessary and advisable that a certified public accountant be employed by your petitioner for the purpose of examining into the books and records of said bankrupt, with particular reference to the transactions had between said bankrupt and Kalman Greenhill, LaSalle Industries, Inc., American Bobbin Company, and other individuals and corporations affiliated or connected with any or all of the foregoing, and to ascertain the reason for the substantial loss occurring in operations of said bankrupt during the year 1955, to the end that if any moneys are due to said bankrupt from any or all of the foregoing, your petitioner will have sufficient information to enable him to properly present said claims and if necessary to take legal action thereon; that Peter Barnett, a certified public accountant of San Francisco, California, is well qualified to perform said work on behalf of said petitioner and by reason thereof your petitioner desires to employ said accountant for the purpose aforesaid.

That said certified public accountant is willing to undertake said accounting work at the rate of $7.00 per hour, the total compensation to be paid said accountant not to exceed in any case the sum of $1,000.00, which your petitioner alleges is reasonable compensation for the services to be performed by said accountant.

III.

Your petitioner alleges that prior to adjudication of said bankrupt a bankrupt, a Creditors' Committee was appointed in proceedings instituted by said bankrupt under Chapter XI of the Bankruptcy Act; that said Creditors' Committee had recommended prior to adjudication that upon the books and records of said bankrupt becoming available a certified public accountant be employed for the purpose of conducting an examination and making a report to the Creditors' Committee; that your petitioner likewise joins in the belief that benefit will accrue to said bankrupt estate by the employment of said certified public accountant.

WHEREFORE, your petitioner prays that he be authorized to employ PETER BARNETT, a Certified Public Acountant, for the purposes aforesaid, and that the compensation to be paid to said certified public accountant will be computed at the rate of $7.00 per day, not in any event to exceed in the maximum $1,000.00.

/s/ JOHN COSTELLO
*Petitioner*

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STATE OF CALIFORNIA )
COUNTY OF ALAMEDA ) ss:

JOHN COSTELLO, being first duly sworn, deposes and says:

That he is the petitioner named and described in the aforesaid Petition; that he has read said Petition and knows the contents thereof and hereby makes solemn oath that the statements contained therein are true according to his best knowledge, information and belief.

/s/ JOHN COSTELLO

Subscribed and sworn to before me
this 1st day of March 1956.

/s/ M. NOLDEN

*Notary Public* in and for the County of Alameda, State of California.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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No. 365

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KALMAN GREENHILL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR REHEARING

Petitioner respectfully applies herewith for a rehearing of the order of this Court, dated November 5, 1962, denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Mr. Justice Douglas dissented from the denial of the petition.

As grounds for this request, petitioner states as follows:

1. Subsequent to the filing of the petition for a writ of certiorari in this case, there has become available a

decision by the Court of Appeals for the Seventh Circuit which, in principle, conflicts with the determination made by the Court of Appeals for the Second Circuit in the instant proceeding. In *United States v. Parker*, 307 F. 2d 585, 589 (C.A. 7), the court ruled that it was not error to deny production, in a criminal prosecution under the Universal Military Training and Service Act, of a Department of Justice hearing officer's report which was not required *by statute or regulation* to be placed in a registrant's file. Obviously, had a statute or regulation required that the report be placed in the file and made available to the registrant, denial of its production at the trial would have been error.

In this case, however, the court below sustained the denial of production of an accountant's report made to the bankruptcy trustee. Under the specific terms of the Bankruptcy Act, Sections 47(a)(10) and 49, that report was open and available for inspection by any party in interest. By virtue of this statutory requirement, denial of production of the report—requested by the petitioner as a party in interest—was clearly erroneous and contrary to the principle recognized in the *Parker* decision of the Seventh Circuit.

2. The foregoing conflict as to the right to secure production of a document, required by statute to be available for inspection, is enough to justify plenary review by this Court. Rule 19(b). Added to this conflict between circuits is the very substantial conflict between the decision below and the relevant decisions of this Court.

*Ex parte Uppercu*, 239 U.S. 435, established the controlling principle that when a document is phys-

ically present within a jurisdiction (as is the case in this instance) "anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule." No such exception has been claimed or demonstrated here; no privilege has been asserted in terms of national security, public interest, confidential character or otherwise. The prosecution has done no more than indicate an unwillingness to have the document examined or used.

Subsequent decisions have expanded this principle in criminal cases so as to end any confidential character documents may possess where the prosecution is "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2), quoted with approval in *Jencks* v. *United States*, 353 U.S. 657, 671. See also *Roviaro* v. *United States*, 353 U.S. 53, 62; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398-401; *Gordon* v. *United States*, 344 U.S. 414, 418-419.

And where the documents have been withheld from the defendant, so that he cannot determine their precise relevance or usefulness, this Court has recognized that "it is not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316. Whether such documents could be used as evidence or for impeachment purpose, as this Court held in *Scales* v. *United States*, 367 U.S. 203, 258, "is a decision which rests, of course, with the defendant himself."

Here the accountant's report could well have been vital to the defense. Since the bankrupt's records went no further than November 30, 1955; and since

the accountant's report covered the period at least until the end of 1955, and probably until March 1, 1956 (when the bankruptcy started and the terminal date of the indictment coverage), the report may well have indicated certain repayments of the "loans" to petitioner which could have exculpated him. But unless and until the accountant's report is produced and examined, in accordance with the mandates of the Bankruptcy Act, no one can say—as the court below purported to say—that the report would not have been admissible as evidence or that it was based on records otherwise available to petitioner.

The decision below is thus contrary to the *Upperco* principle and the dictates of fair judicial administration as enunciated in *Jencks*, *Clancy* and *Scales*. Moreover, the decision below is at war with the plain language of Sections 47(a)(10) and 49 of the Bankruptcy Act. The need for reviewing and resolving such conflicts, particularly where the liberty and reputation of a citizen are at stake, justifies the grant of certiorari.

## CONCLUSION

For these reasons, as well as those expressed in the petition for a writ of certiorari, the order denying the petition should be vacated and a writ of certiorari should issue.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N.W.
Washington 6, D.C.
*Counsel for Petitioner*

November 30, 1962

**CERTIFICATE**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EUGENE GRESSMAN
*Counsel for Petitioner*